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No. 02-834

In The

Supreme Court of the United States

JERICOL MINING INC. and OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

EUGENE NAPIER and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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8 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUPPLEMENTAL BRIEF 1

TABLE OF AUTHORITIES

Page

CASES:

Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359 (1998) 4

Black & Decker Disability Plan v. Nord, No. 02-469 ..1, 2, 5

Consolidation Coal Co. v. Held, 314 F.3d 184 (4th Cir. 2002) 4

Darland v. Fortis Benefits Ins. Co., ___ F.3d ___, 2003 WL 141620 (6th Cir. Jan. 22, 2003) 3

Gray v. Peabody Coal Co., 35 Fed. Appx. 138 (6th Cir. 2002) (unpublished), *petition for cert. filed*, 71 U.S.L.W. 3319 (U.S. Oct. 17, 2002) (No. 02-585) 3

Peabody Coal Co. v. Groves, 277 F.3d 829 (6th Cir. 2002), *petition for cert. denied*, 71 U.S.L.W. 3474 (Jan. 13, 2002) (U.S. No. 02-249), *petition for reh'g pending* 2, 3, 4, 5

Regula v. Delta Family-Care Disability Survivorship Plan, 266 F.3d 1130 (9th Cir. 2001), *petition for cert. filed*, 71 U.S.L.W. 3001 (U.S. No. 01-1840) 2, 3

Tussey v. Island Creek Coal Co., 982 F.2d 1036 (6th Cir. 1993) 2

STATUTES AND REGULATIONS:

Administrative Procedure Act, 5 U.S.C. §§ 551-559 3

Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 3

Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 3

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners Jericol Mining Inc. and Old Republic Insurance Company respectfully submit this supplemental brief to request that the Court hold their petition for a writ of certiorari in abeyance pending the Court's decision on the merits in *Black & Decker Disability Plan v. Nord*, No. 02-469 ("*Nord*"). The decision in *Nord* is highly likely to be dispositive of the matters presented here. The relief requested by this motion is warranted and appropriate for the reasons that follow:

1. In this case, the Sixth Circuit affirmed an award of benefits to Eugene Napier under the Black Lung Benefits Act. 30 U.S.C. §§ 901-945. The Administrative Law Judge ("ALJ") awarded benefits relying principally on the opinion of a physician who treated the claimant. App. 35. The decision was affirmed by the Department of Labor's Benefits Review Board in substantial reliance on the Sixth Circuit's earlier opinion mandating extra weight for treating doctors. App. 26, 28.

2. On appeal, the Sixth Circuit held that the ALJ did not have a proper basis for according more weight to Napier's treating physician, noting that its rule was not automatic and had been applied erroneously. The court nevertheless affirmed the award of benefits on the ground that it was supported by substantial evidence. It was not, however, evidence that controlled the ALJ's decision; it was a treating doctor preference or presumption. Here, substantial evidence review was inappropriate and its invocation to affirm a blatant treating doctor preference is simply a clever device to approve the preference while denying having done so.

3. On January 10, 2003, this Court granted a writ of certiorari in *Nord*. The question presented in *Nord* is: "Whether the Ninth Circuit erred in holding that an ERISA disability plan administrator's determination of disability is subject to the 'treating physician rule' and, therefore, the plan administrator is required to accept the treating physician's opinion of disability as controlling unless the plan administrator rebuts that opinion in writing based upon substantial evidence on the record." The petition in this case challenges the Sixth Circuit's application of a treating physician rule in federal black lung benefits claims.

4. Both the ERISA rule and the black lung rule require the fact finder to give preferential treatment, if not controlling weight, to a benefit applicant's treating doctor solely because of the physician's status. Both rules originate in SSA disability benefit claims arising in several circuits that accorded extra weight to a treating doctor in determining a claimant's entitlement or degree of disability. *Compare Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1138-39, 1143-44 (9th Cir. 2001), *petition for cert. filed*, 71 U.S.L.W. 3001 (U.S. June 13, 2002) (No. 01-1840) ("We see no reason why the [SSA] treating physician rule should not be used under ERISA") *with Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042 (6th Cir. 1993) (citing SSA claims determinations as authority for holding "it is clearly established that opinions of treating physicians are entitled to greater weight. . . ."). Moreover, on January 22, 2003, the Sixth Circuit joined the Ninth Circuit in mandating a treating physician rule for ERISA disability claims, citing its decision in *Peabody Coal Co. v. Groves*, 277 F.3d 829 (6th Cir. 2002), *cert. denied*, 71 U.S.L.W. 3474 (Jan. 13, 2003)

(U.S. No. 02-249), *petition for reh'g pending*, as the only Sixth Circuit authority for doing so. *Darland v. Fortis Benefits Insurance Co.*, ___ F.3d ___, 2003 WL 141620 at *15 (6th Cir. Jan. 22, 2003).

5. Neither the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, nor the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461, authorizes a treating doctor rule. In both ERISA and black lung claims, the courts that accept a treating doctor preference rely on a judicially created and unsubstantiated assumption that by having a treating relationship with the patient a treating doctor acquires significant knowledge not knowable by other experts. *See Darland*, 2003 WL 141620 at *16, *quoting Regula*, 266 F.3d 1130.

6. Although the black lung cases[1] raise additional issues under the Administrative Procedure Act, 5 U.S.C. §§ 551-59 ("APA"), and challenge the Department of Labor's adoption of a new treating doctor regulation, there is no meaningful difference between the ERISA rule the Court has elected to review and the black lung rule. The DOL regulation is not supported by science, but is premised on the SSA rule. *See* 65 Fed. Reg. 79931-34 (Dec. 20, 2002). The regulation, therefore, like the Sixth and Ninth Circuit ERISA rules, rests solely on the authority and intellectual force of the SSA rule. The APA issue arises

[1] Three black lung cases challenging the Sixth Circuit's application of a treating doctor rule have been petitioned to this Court including this case, *Peabody Coal Co. v. Groves*, No. 02-249 and *Gray v. Peabody Coal Co.*, 35 Fed. Appx. 138 (6th Cir. 2002) (unpublished), *petition for cert. filed*, 71 U.S.L.W. 3319 (U.S. Oct. 17, 2002) (No. 02-585). A similar request is being made in *Gray*.

because the treating doctor rule artificially exaggerates the significance of certain evidence in a manner that has been disapproved by this Court in APA adjudications. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998). Whether or not the APA applies, however, the black lung rule shares much common legal ground with the ERISA rule and is predicated upon an identical rationale.

7. In opposition to the petition, the U.S. Department of Labor again presses the untenable theory that the circuits agree that a treating doctor rule is appropriate for black lung claims and that a treating doctor rule was not the basis for the Sixth Circuit's decision here. It is hard to dispute the circuit disagreement following the Fourth Circuit's decision in *Consolidation Coal Co. v. Held*, 314 F.3d 184 (4th Cir. 2002). In *Held*, the majority expressly refuses to accord weight for status to a treating doctor, while the dissent argues for application of the Sixth Circuit's approach in *Jericol*, 314 F.2d at 187-188, 189. The Fourth Circuit has no illusions about the Sixth Circuit's application of a treating doctor rule in this case. DOL's argument that no treating doctor rule was applied simply partners the agency with the Sixth Cirucit in efforts to enforce the rule *per se* while denying having done so.

8. Finally, there is considerable urgency in having the black lung treating doctor issue resolved expeditiously. Although acceptance of a treating doctor rule predicts substantial disruptions for employee benefit plans, significant disruptions already have occurred for coal mine operators and their insurers as a result of the black lung treating doctor rule. Basic insurance rates for smaller mine operators have increased by at least 200% in significant part in anticipation of a widespread treating doctor rule. *See Groves*, Petition for Certiorari at 28 nn. 20-21.

Unrefuted actuarial studies predict substantial increases in benefits and medical costs for employers and insurers as well. *Id.* The treating doctor preference touches on all medical eligibility criteria in black lung claims and is, therefore, the principal cost driver for these increases. *Id.*, nn. 19, 20.

9. Jericol Mining and Old Republic should not be required to pay black lung benefits solely as a result of a rule that is invalid for ERISA cases, should that be the result in *Nord*. Nor should these petitioners have their rights extinguished prematurely in this case.

It is, therefore, respectfully requested that this Court delay consideration of this petition for a writ of certiorari until a decision is issued in *Nord*.

Respectfully submitted,

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